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NO. 91-1618 (A-693)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

GEORGE V. VOINOVICH,
Governor of the State of Ohio, *et al.*,
Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore
of the Ohio House of Representatives, *et al.*,
Appellees.

Appeal from the United States District Court for the Northern District of Ohio

MOTION TO DISMISS APPEAL AND TO AFFIRM RULING OF TRIAL COURT

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QUESTIONS PRESENTED

In a state where black legislators have regularly been elected because of very substantial white crossover voting, does the Voting Rights Act require that a state apportionment board draw majority-minority districts wherever possible?

Relying upon the federal supremacy of the Voting Rights Act, may a state apportionment board depart from state law and adopt a "policy" of majority-minority legislative districts statewide where there is no proof of legally significant racial bloc voting or inability of black voters to elect representatives of their choice?

Where Section 5 of the Voting Rights Act is not applicable, does a state apportionment board possess the unreviewable discretion to apply Section 5 remedies on a statewide basis?

Whether the trial court properly found that the Defendants-Appellants deliberately packed and fragmented black voters for the purpose of destroying coalitional voting of black and white voters in Ohio in violation of the Fifteenth Amendment.

Whether the trial court properly found that the Ohio Apportioning Board departed from the 10% total population deviation in legislative districts in violation of the Fourteenth Amendment of the United States Constitution.

LISTING OF ADDITONAL PARTIES

Appellants

STANLEY J. ARONOFF, President of the Ohio Senate, ROBERT A. TAFT, II, Secretary of State of Ohio, and JAMES R. TILLING, Chief Executive Officer of the Ohio Senate.

Appellees

THOMAS E. FERGUSON, Auditor of State of Ohio, GLEN ACHTERMANN, SAM BARONE, SANDRA GUY, ROBERT McLAUGHLIN, JAMES B. McCARTHY, GLADYS HENSON, TOM KILBANE, ROBERT H. TRAINER, A. WAYNE BUSSLER, JAMES M. SPEROS, KENNETH THORNE, CHARLES WALKER, WILURT SHANKLIN, TYRONE RILEY, WILLIAM MALLORY, Representative of the 23rd Ohio House District, RICHARD CORDRAY, Representative of the 33rd Ohio House District, PAUL MECHLING, Representative of the 91st Ohio House District, RONALD GERBERRY, Representative of the 71st Ohio House District and MARY ABEL, Representative of the 94th Ohio House District.

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OPINIONS BELOW

The January 31, 1992 Opinion and Order of the three-judge court has not yet been officially reported. It was filed in the United States District Court for the Northern District of Ohio, Eastern Division, in case number 5:91CV-2219, and is set forth in Defendants-Appellants' Appendix at App. 1a

The March 10, 1992 Order of the three-judge court has not yet been officially reported. It is set forth in Defendants-Appellants' Appendix at App. 118a.

The March 19, 1992 Findings of Fact, Supplemental Memorandum of Law, and Order of the three-judge court has not yet been officially reported. It is set forth in Defendants-Appellants' Appendix at App. 127a.

The March 31, 1992 Order of the three-judge court has not yet been officially reported. It is set forth in Defendants-Appellants' Appendix at App. 324a.

JURISDICTION

The Orders appealed from were filed by the three-judge court on March 10, 1992, March 19, 1992 and March 31, 1992. This Court has jurisdiction pursuant to 28 U.S.C. § 1253.

STATEMENT OF THE CASE

On September 19, 1991, before the publication of the State of Ohio's apportionment plan on October 1, 1991, the Ohio Apportionment Board majority ("Board") filed an original action in the Ohio Supreme Court. It asked that court to declare, *inter alia*, that the Board's plan complied with the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act of 1965. It also asked the court to enjoin the minority members of the Board, Messrs. Quilter and Ferguson, from instituting proceedings in other courts. This was the first of a series of actions taken by the Defendants-Appellants in an effort to deprive the federal courts of jurisdiction over their plan.[1]

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[1] The statement of the Defendants-Appellants that the Ohio Supreme Court, in the *per curiam* decision in *Voinovich* v. *Ferguson*, 63 Ohio St. 3d 198 (1992), "concluded that the plan of apportionment was constitutional under the Ohio Constitution" implies that the state court reached the same issues as the federal trial court below. *See*, Jurisdictional Statement of Defendants-Appellants, p. 4 n.3 [hereinafter Jur. State.]. In fact, the Ohio Supreme Court decided only one issue, in which it deferred to the Apportionment Board's alleged discretion on the question of whether Ohio's boundary requirements were to be honored at the expense of equal population representation. 63 Ohio St. 3d at 203. Having erroneously elevated the

Without fully detailing the myriad of ensuing procedural maneuvers in the courts below, the Plaintiffs-Appellees filed the present case in the United States District Court for the Northern District of Ohio on November 1, 1991, in order to have a federal court hear federal questions. The Chief Judge of the Sixth Circuit Court of Appeals thereafter on November 7, 1991 empaneled a three-judge district court.

In their November 1, 1991 Complaint, the Plaintiffs-Appellees alleged that the Board's plan impermissibly used race to draw state legislative and congressional districts and diluted minority voting strength in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution. They also asserted that the plan violated Article XI of the Ohio Constitution which provides specific apportionment guidelines. In response, Defendants-Appellants contended that the Voting Rights Act, as amended in 1982, and federal case law required that wherever possible the Board must create majority-minority districts, *i.e.*, legislative districts in which members of a minority group comprise the majority.

Extensive deposition and document discovery was conducted on an expedited basis. The trial court held hearings on December 3 and December 17, 1991. The parties submitted a full record for the court's review. On January 31, 1992, the trial court issued its decision holding that the Voting Rights Act and federal precedent did not dictate the mandatory *per se* creation of majority-minority districts. The court held that while the creation of such districts might be an appropriate remedy under certain circumstances, the Defendants-Appellants had failed to make the requisite factual findings demonstrating the necessity of applying any remedy under the Voting Rights Act. Opinion, 1/31/92, Defendants-Appellants' Appendix A at 2a [hereinafter D.A. App.].

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maintenance of several county and municipal boundaries over equal population in the districts, the Board violated the Fourteenth Amendment of the United States Constitution. *Gonnor* v. *Finch*, 431 U.S. 407, 416-417 (1977).

The trial court ordered the Board to reconsider its apportionment plan and directed that unless the Board could show justification under a totality of circumstances analysis for the configuration it adopted, the Board was required to submit a revised plan within 20 days of the date of the court's Order. The court stated that in the event that a revised plan was not received within the time limit, it would take further action *sua sponte*. *Id.* at 14a-15a. The trial record showed the sustained ability of black legislators to be elected with far less than a black majority, and an absence of significant racial bloc voting in Ohio. In these circumstances, *inter alia*, the court determined that "the Board's plan packs minority voters, with dilutive effects that violate the Voting Rights Act." *Id.* at 14a.

Thereafter, on February 19, 1992, in response to the trial courts's Order, the Board for the first time submitted findings and conclusions in an attempt to justify its plan. It also submitted an apportionment plan which the trial court found was identical to the October, 1991 plan, except for the correction of "technical errors." Order, 3/10/92, D.A. App. C at 119a. The trial court found that the Board's second submission contained "only meager information that was not previously before this Court," and held that this "information is not of assistance in answering the 'question as to whether the political processes were "equally open",' nor does the analysis constitute the 'searching practical evaluation of the "past and present reality" ' contemplated by the legislative history of the 1982 amendments to the Voting Rights Act." *Id.* at 119a. The court also found that the Board's plan violated the Fifteenth Amendment of the United States Constitution. *Id.* Finally, the court enjoined any election for the Ohio General Assembly until a constitutional plan was submitted, appointed a Special Master to draw such a plan, vacated the May 5, 1992 Ohio primary date, and directed that a primary election be held on June 2, 1992. *Id.* at 119a-120a.

The Defendants-Appellants moved the trial court to stay its order of March 10, 1992, pending appeal to the United States

Supreme Court. On March 19, 1992, the trial court issued its Findings of Fact, Supplemental Memorandum of Law, and Order (D.A. App. D) denying the motion for stay pending appeal and supplementing its previous factual findings and legal conclusions on the merits. The trial court once again held that the Board's plan deliberately packed and fragmented black voters in violation of the Voting Rights Act and Fifteenth Amendment. D.A. App. D at 140a-143a. The court also found that the plan violated the Fourteenth Amendment because it departed from the 10% total deviation rule applied by the Supreme Court in *Connor* v. *Finch*, 431 U.S. 407, 416 (1977). D.A. App. D at 146a-148a.

By its order of March 31, 1992, the trial court reset the primary date for General Assembly elections in Ohio to September 8, 1992, due to the purported inability of the Secretary of State to comply with the June 2, 1992 date. On April 20, 1992, this Court stayed the trial court's Orders of March 10 and March 31, 1992, pending final disposition of the appeal.

ARGUMENT

I. THE STATE REAPPORTIONMENT BOARD MAY NOT WITHOUT PROOF ASSUME STATEWIDE VIOLATIONS OF THE VOTING RIGHTS ACT, APPLY A "REMEDY" WHICH PACKS AND FRAGMENTS BLACK VOTING STRENGTH AND DENY ANY OBLIGATION TO PROVIDE FACTUAL SUPPORT FOR ITS "REMEDY"

A. The Defendants-Appellants Justified Their Plan on the Basis of Alleged Voting Rights Act Violations, but Rejected any Obligation to Provide Factual Support for These Allegations

The Defendants-Appellants drew a plan of apportionment which from its initial stages to its final implementation has always been based upon the premise that the State of Ohio was requried by the Voting Rights Act, 42 U.S.C. § 1973, to create the maximum number of majority-minority districts. They justified this approach wholly on the grounds that it was mandated by the Voting Rights Act as interpreted by the holding of this Court in *Thornburg* v. *Gingles*, 478 U.S. 30 (1986).[2] More recently, Defendants-Appellants have recast their justification for their plan of apportionment and now maintain that they have the unreviewable discretion to follow their mechanistic *per se* approach of creating majority-minority districts because their motives were "to avoid diluting minority voting strength," and to implement "the policy of the state of drawing minority controlled districts . . . ." Jur. State., pp. 8-10.

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[2] "In adopting the 1991 Apportionment Plan, Defendants corrected the voter dilution inherent in the Democrats' 1981 apportionment." Defendants' Pre-Trial Brief, Page 28. "Where opportunities exist, the State must *maximize* minority voting strength. Thus, it may be a violation of Section 2 for a state to fail to create a district in which minorities are the majority if such a district can be created. . . . Even if not a 'right,' maximization of minority voting strength may clearly be a 'remedy.'" *Id.* at pp. 32-33; see also, *id.* at pp. 13, 29, 36, 39.

The Defendants-Appellants' alleged "policy of the state" is nowhere to be found in any of four sources where Ohio law or policy customarily is set forth, *i.e.*, its Constitution, statutes, the legal decisions of its courts, or the Joint Resolutions of its legislature. In fact, this "policy" is solely the "policy" of the Defendants-Appellants, which they have sought to characterize as a Voting Rights Act "mandate." The trial record shows that rather than avoiding minority voter dilution, the Defendants-Appellants deliberately concentrated blacks into districts where they constituted excessive majorities, a practice known in political science literature on gerrymandering as "packing."[3] The record also demonstrates that the Defendants-Appellants packed black voters with the intent to destroy effective coalitional voting between blacks and whites in Ohio. D.A. App. D at 132a, 140a-143a.

The Defendants-Appellants claim the right to adopt a *per se* approach to creating majority-minority districts without any factual analysis to determine whether this "remedy" was necessary to overcome racial bloc voting that prevented black voters from electing representatives of their choice. The validity of this claim is essential to the successful defense of their plan. Even a minimal factual analysis by the Board would have shown that in Ohio there has been no legally significant racial bloc voting in the state's legislative elections. Black legislators have been regularly elected over sustained periods of time precisely because they continually enjoyed the support of either a majority or near majority of white voters in coalition with majority support from the black voters in their district. *Id.* at 133a n.2, n.3. The trial court found that the destruction of this coalitional voting of blacks and whites was the intentional "target" of the Defendants-Appellants' plan of apportionment. *Id.* at 132a-133a.

The Defendants-Appellants argue in this Court that they have no obligation to make any "totality of circumstances"

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[3] Parker, *The Mississippi Congressional Redistricting Case: A Case Study in Minority Vote Dilution*, 28 Howard L. J. 397, 399 & n.13 (1985).

analysis under the Voting Rights Act before creating majority-minority voting districts wherever possible. This argument is quite inconsistent with their prior admissions and representations to the trial court. Before the plan was adopted, public meetings were held around the state and at these meetings, James R. Tilling, the Board's secretary and official spokesman, as well as the sole "architect" of the plan, acknowleged the Board's obligation to "establish for the record the totality of circumstances in each urban area" to comply with the Voting Rights Act.[4]

Defendants-Appellants alleged at trial that they were preventing the continuation of Voting Rights Act violations which purportedly arose out of the 1981 apportionment of Ohio.[5] When the trial court inquired as to the factual basis of this allegation of prior Voting Rights Act violations, the Defendants-Appellants then adverted to the fifteen public meetings that Defendants-Appellants Tilling and Secretary of State Robert Taft held around the state, which they said, provided "the totality of circumstances" record upon which they relied.[6]

The trial court's logic in requiring the Board to make a "totalities" analysis derived from its accurate observation that "[a]s justification for these [majority-minority] configurations, Defendants assert that the Voting Rights Act and federal case law *mandate* the drawing of majority-minority districts." D.A. App. A at 7a-8a (emphasis added). The trial court disagreed with the "mandate" argument, holding that the Voting Rights Act contained "no requirement for majority-minority districts," but rather prohibited all "practice[s]" which result in the "abridgment" of the voting rights of a protected class. *Id.* at 8a.

Having determined that neither the Act nor this Court's decision in *Gingles*, *require* the creation of majority-minority districts (D.A. App. A at 8a-10a), the trial court reviewed the

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[4] D.A. App. A at 6a.

[5] *Id.* at 11a. *Accord:* Defendants' Pre-Trial Brief, at 26-28.

[6] *Id.* at 33-36.

issue of whether, as the Defendants-Appellants asserted, the majority-minority configuration was *permissible* to "remedy" alleged prior violations of the Voting Rights Act under the 1981 Ohio plan of apportionment. *Id.* at 11a. In this regard, the court noted that under the law, violations of the Voting Rights Act may not be assumed but that an in-depth analysis of the totality of the circumstances in the locality at issue is a prerequisite for such a finding. *Id.* The court found the evidence supplied by the Defendants-Appellants to show violations under the 1981 plan to be "grossly inadequate." *Id.*

To support its finding that the evidence was "grossly inadequate," the court observed that the evidence showed no proof of the two essential factual determinants: (1) significant amounts of racial bloc voting; and (2) the inability of minority candidates to be elected because of racial bloc voting. *Id.* at 11a-12a. The court found that each of the 11 current black legislators in Ohio had been continuously elected to between six and 13 terms. For the elections between 1984 and 1990, each black legislator was elected with an average plurality ranging between 68.27% and 72.64%. Under the 1981 apportionment plan, the black population in the black legislators' districts ranged from 38.5% to 53.19%, yet under the 1991 plan the black population of these districts was increased between 7.7% and 13.68%. *Id.* at 7a.

The court deplored the fact that the Board did no regression analysis or extreme case analysis as was set forth in *Gingles*, to determine the extent of racial bloc voting. *Id.* at 11a-12a. The court also noted that the Board's spokesman, Tilling, equivocated on the issue of what constituted legally significant racial bloc voting and found it "disturbing" that Tilling's purported racial bloc voting analysis was based upon a casual analysis which had never been reduced to writing. *Id.* at 13a. The court criticized the failure of Tilling to "examine the voting record of any single representative to determine his responsiveness to the minority community." *Id.* Finally, the court rejected the anecdotal nature of the historical analysis performed by Tilling and the substitution of his personal experience for the "searching practical evalua-

tion of past and present reality" required by the legislative history of the Voting Rights Act. *Id.* at 13a-14a. In short, the court's analysis fully demonstrated that the evidentiary support for the "remedy" applied by the Board was, indeed, "grossly inadequate."

Since the Defendants-Appellants failed to supply a factual basis for their argument that 1981 Ohio Apportionment violations of the Voting Rights Act required a "remedy," the court held that there was no legal justification for a plan admittedly designed to create the maximum number of majority-minority districts. The court also held that in the absence of a legal justification for the remedy adopted, the Board through its plan packed minority voters, "with dilutive effects that violate the Voting Rights Act." *Id.* at 14a.

Packing and fragmenting are devices repugnant to any fair apportionment plan; but when they are used to dilute the effectiveness of black voters on a statewide basis, the Voting Rights Act is violated.[7] Moreover, when the same devices are intentionally and deliberately applied to gerrymander black voters the Fifteenth Amendment is violated.[8]

The Defendants-Appellants chose not to appeal from the January 31, 1992 decision of the trial court and stipulated that so much of their appeal as related to this Order was dismissed from the case. D.A. App. F. Thus, the question of whether the 1991 Board plan of apportionment was permissible is not at issue on this appeal nor in the related stay.

B. In Effectuating the Majority-Minority Practice in Ohio, the Defendants-Appellants Departed From this Court's Holding in *Gingles*

Two critical factual findings determined the outcome at the trial level. First, the trial court found that "legally signifi-

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[7] *Gingles*, 478 U.S. 30, 46 n.11 (1986).

[8] *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960); *Reynolds* v. *Sims*, 377 U.S. 533, 554 (1964).

cant racial bloc voting was *not* shown in Ohio to have prevented black voters from electing representatives of their choice in *any* district other than the two districts (51 and 52) addressed by the court in *Armour*." D.A. App. D at 132a.[9] Secondly, the court found "[t]here is simply no proof to support a finding of the inability of black voters either to elect candidates of their choice or to affect the election of candidates of their choice in given legislative districts." *Id.*

The trial court held that if difficulty in electing candidates of choice and racial bloc voting are not proven then the basis upon which "a remedy" must be premised is missing. *Id.* In so ruling, the court followed the reasoning of *Gingles*, that where racial bloc voting did not exist or where blacks had been elected over a sustained period of time, there could be no violation of the Act. On this point *Gingles* stated:

> "In recognizing that some Senate Report factors are more important to multimember district vote dilution claims than others, the Court effectuates the intent of Congress. It is obvious that unless minority group members experience substantial difficulty electing representatives of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.' Section 2(b)."

478 U.S. at 48 n.15.

The historical record of Ohio, unlike that of North Carolina in *Gingles*, showed that inter-racial coalitional voting, not racial bloc voting, had been the rule in the state. Each of the 11 black legislators presently serving in the Ohio General Assembly had been elected over a sustained period of time with a white crossover vote that was very substantial, usually more than 50%. D.A. App. D at 132-133a. The court cited with approval the opinion of Dr. Henderson, the

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[9] In *United States* v. *Marengo County Comm'rs*, 731 F.2d 1546 (11th Cir.), *cert. denied*, 469 U.S. 976 (1984), the court held that proof of racially polarized voting is ordinarily the keystone of vote dilution claims.

Plaintiffs-Appellees' expert, who stated that the white crossover vote in these 11 minority districts was clear evidence of coalitional voting, *i.e.*, that a significant portion of white voters were repeatedly willing to vote for the candidate who was also the demonstrated choice of black voters. *Id.* at 133a n.2. "[T]he size of the white crossover vote provides one measure or criterion by which [one] may assess what the dividing line is between packing and not packing minority voting strength." *Id.* at 141a n.6 (citing Deposition of G. Henderson, p. 23). Here, the white and black coalitional voting was sufficiently great to provide very substantial and sustained pluralities for black legislators. To add black voters to the districts of these highly successful legislators simply wasted black votes in these districts and deprived blacks of the opportunity to elect or influence the election of a responsive legislator in adjoining districts.

The decision below held that the mere assumption of prior Voting Rights Act violations cannot be substituted for careful analysis by one who seeks to invoke the sweeping remedies made available by the Voting Rights Act. *Id.* at 130a-131a. However, to escape having to address either the controlling *Gingles* precedent or the disposition reached by the court below on the full factual record, the Defendants-Appellants would frame the issue here as a simple question of which party bears the burden of proof.[10] In doing so, however, Defendants-Appellants were forced to distort the panel's ruling beyond recognition. The court below did not make any erroneous ruling that a defending party must bear the burden of proof in a case brought under the Voting Rights Act. Instead, the court noted the plain fact, based on its own careful review of the factual record before it, that this reapportionment unnecessarily and unjustifiably concentrated black voters "into districts where they constitute an excessive majority" and further noted that this action can constitute an il-

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[10] Jur. State. p. 11.

legal dilution of racial minority group voting strength. D.A. App. A at 8a; *see Gingles*, 478 U.S. at 46 n.11.

Furthermore, the trial court specifically considered and rejected the argument presented here by Defendants-Appellants that its January 31, 1992 Opinion and Order held that an apportioning board must engage in a totality of circumstances analysis prior to any racially conscious redistricting to avoid the division of contiguous, cohesive concentrations of minorities. D.A. App. D at 130a-131a. It also rejected the Defendants-Appellants' argument that the court's holding was that a state may not anticipate a possible Voting Rights Act challenge and attempt to remedy any potential violation unless it first analyzes the totality of circumstances. *Id.*

In rejecting these arguments, the trial court pointed to the factual circumstances of this case. The court stated that: it was "not faced with mere race-conscious redistricting that sought to avoid the division of contiguous cohesive concentration of minorities;" it was "not faced with a plan that simply created a substantial number of majority-minority districts without explanation;" and finally, it was "not faced with a state subject to Section 5 of the Voting Rights Act, in which case the historical violation of minority rights has been conclusively established." *Id.* at 131a. Instead, the court stated that it "addressed an apportionment board that applied a rule mandating the creation of majority-minority districts wherever possible. The Board did not purport to devise this rule based on Ohio policy and law; rather it contended that such a *per se* rule is mandated by federal law." *Id.*

The trial court stated, the wholesale creation of majority-minority districts on a statewide basis is a "remedy" which might be applied in appropriate circumstances. It is not a "right" which *must* be applied. *Id.* at 132a. To support such a remedy, the court said, a violation must be found. In the absence of such a violation, the trial court held that the Voting Rights Act may not be applied mechanistically to maximize the creation of majority-minority districts whenever possible. It held that no *per se* requirement for

majority-minority districts was mandated by the Act, by this Court's decisions, or by the decisions of the lower courts. *Id.* at 131a-132a. The trial court, citing *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144, 161 (1977), further stated that "[t]he implication [of *Carey*] is clear: the creation of majority-minority districts wherever possible is a remedy, not a right." *Id.* at 132a.

In summary, the Ohio Apportionment Board seeks to arrogate to itself the authority to create new federal law under a plan not justified either by federal law or by Ohio law. Tilling, the Board spokesman and architect of the flawed plan, admitted that he deliberately violated the Ohio Constitution in order to comply with his understanding of the Voting Rights Act.[11] Section 7(D) of Article XI of the Ohio Constitution requires the Board to adhere to existing legislative boundary lines except when it must depart to comply with the population requirements of Section 3 of Article XI.[12] Tilling testified that if there had been no Voting Rights Act requirement to create majority-minority districts, he understood that he would not have had to cross these Ohio political boundaries. D.A. App. D at 142-143a n.8 (citing Tilling II, p.

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[11] D.A. App. D at 142a-143a n.8, (citing deposition of James Tilling, dated Nov. 22, 1991, p. 49 [hereinafter Tilling II]).

[12] Ohio Const. art. XI, § 3 provides:

> "The population of each house of representatives district shall be substantially equal to the ratio of representation in the house of representatives, as provided in section 2 of this Article, and in no event shall any house of representatives district contain a population of less than ninety-five per cent nor more than one hundred five per cent of the ratio of representation in the house of representatives, except in those instances where reasonable effort is made to avoid dividing a county in accordance with section 9 of this Article."

Ohio Const. art. XI, § 7(D) provides:

> "In making a new apportionment, district boundaries established by the preceding apportionment shall be adopted to the extent reasonably consistent with the requirements of section 3 of this Article."

52). However, following his untutored and lay understanding of the concept of federal supremacy, Tilling drew the lines that he perceived were required by the Voting Rights Act even though this ignored Ohio constitutional provisions. *Id.* (citing Tilling II, pp. 51-52).

These Ohio constitutional provisions were enacted in 1971 specifically to prevent the pervasive political gerrymandering which their abandonment has now permitted. *See State ex rel. Herbert* v. *Bricker*, 139 Ohio St. 499, 509 (1942).[13] The Board ignored the Ohio Constitution, exempted itself from the necessity of providing a factual basis for its "remedy," and declined even to shoulder the threshold burden of showing the existence of racial bloc voting and the inability of black voters to elect representatives of their choice.

II. THE DEFENDANTS-APPELLANTS HAVE WAIVED ANY ARGUMENT THAT THEY SHOULD NOT HAVE THE BURDEN OF JUSTIFYING THEIR PLAN

The Defendants-Appellants voluntarily shouldered the burden to examine the "totalities of the circumstances" in the urban areas where they proposed to draw majority-minority districts. From the beginning of the process they consistently

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[13] In *Bricker*, the Ohio Supreme Court said:

> "The objective sought by the constitutional provisions was the prevention of gerrymandering. By creating a board of *ex officio* members and adopting self-acting provisions it was sought to place the function of apportionment in impartial hands and at the same time mark the way so that in the main at least the provisions of the Constitution would work automatically and the apportioning process ordinarily be a mere matter of calculation. *If the proper construction were that the districts fall apart at the end of each decennium, an entirely new adjustment would be necessary and the way for gerrymandering opened up.*"

139 Ohio St. at 509 (emphasis added).

argued to the trial court that their evidentiary submissions met the totalities test of the Voting Rights Act. When the trial court disagreed with their assessment of the proffered evidence, the Defendants-Appellants again voluntarily undertook to submit new evidence on February 19, 1992. They rejected out of hand any obligation to supply a factual basis for their "remedy" only after the trial court held on March 10, 1992, that "the Board fails once again to justify its wholesale creation of majority-minority districts, thus rendering the plan, as submitted, violative of the Voting Rights Act of 1965." D.A. App. C at 119a; Jur. State., p. 10. They exercised their choice to attempt to comply with the trial court's order on the merits of the case and allowed the 30-day appeal time to expire.

The Defendants-Appellants now seek to avoid the impact of their failure to appeal by arguing that the "whole case" is before the Court for review, citing *Fusari* v. *Steinberg*, 419 U.S. 379 (1974). The *Fusari* case is simply inapplicable here. In that case, the three-judge district court had held that an unemployment compensation statute of Connecticut was unconstitutional and after this Court noted probable jurisdiction, Connecticut significantly revised its unemployment statutes. *Id.* at 379-80. This Court determined that it was inappropriate to decide the issues tendered by the parties and remanded for reconsideration in light of intervening changes in Connecticut law. *Id.* at 390. No comparable circumstances are even arguably present in this case. Further, the issue in *Fusari* involved the failure to file a cross-appeal; here, there was no appeal whatsoever.

Faced by Plaintiffs-Appellees' motion to dismiss under Supreme Court Rule 18.5, filed March 19, 1992, Defendants-Appellants proposed that the parties stipulate that so much of the case as related to the January 31, 1991 decision of the trial court was not before the Supreme Court on appeal. Having voluntarily so stipulated, the Defendants-Appellants are bound by their sitpulation and may not unilaterally abandon it. They have not repudiated this stipulation and may not now avoid its impact.

Even assuming, *arguendo*, that in the absence of such a stipulation the "whole case," including the January 31, 1992 Order, was before this Court, the stipulation was a knowing waiver of any purported legal right they may have had to argue that point. The Defendants-Appellants entered into this stipulation to avoid a ruling by the trial court on a motion filed by Plaintiffs-Appellees to dismiss so much of the case as pertained to the trial court's January 31, 1992 Order because of the Defendants-Appellants' failure to appeal that Order. Rather than face the predictable outcome of that motion, they stipulated the result but now seek to escape the effects of their stipulation.

The Defendants-Appellants do not contend that they could have implemented the 1991 plan without violating the January 31, 1992 Order of the trial court; instead, they argue at length that the court erred on the merits of its holdings. Any fair reading of the trial court's January 31, 1992 Opinion and Order requires the conclusion that the trial court reached the merits of the Plaintiffs-Appellees' Voting Rights Act claim; no argument is presented to the contrary. Accordingly, a direct appeal to the Supreme Court was available but waived. *See*, *MTM, Inc.* v. *Baxley*, 420 U.S. 799, 804 (1975).

III. THE EVIDENCE SHOWS THAT THE DEFENDANTS-APPELLANTS INTENTIONALLY PACKED AND FRAGMENTED BLACK VOTERS IN VIOLATION OF THE FIFTEENTH AMENDMENT

The Defendants-Appellants have urged this Court to note probable jurisdiction and reverse the trial court's evidentiary finding that the Board violated the Fifteenth Amendment to the United States Constitution. Jur. State., pp. 21-23. The thrust of their argument is: 1) that the plan was not drawn with a discriminatory motive against blacks, 2) that the dilutive effect of the plan was not known to the Board, and 3) that the persons who attempted to influence the Appellants to use the Voting Rights Act for partisan political advantage were not involved in drafting the plan itself. *Id.* at p. 22.

A central holding of the trial court was that in a state where coalitional voting was such that black candidates were repeatedly elected from districts with only 35% balck population, the *per se* requirement of the creation of majority-minority districts has a dilutive effect on black voters and this result was "exactly what the Defendants intended." D.A. App. D at 141a-142a. The court stated:

> "Indeed, the issue here is not whether the Board should be permitted to redress proven wrongs, but instead, whether the Board should be permitted to destroy what is right in Ohio — that is, coalitional voting. As shown by evidence introduced by both parties, the white crossover vote for black legislative candidates was very substantial, usually more than 50%. Such voting is not legally significant racial bloc voting, rather it is coalitional voting, and this coalition of black and white voters is the target of the Board's plan."

Id. at 132a-133a.

The trial court found the Defendants-Appellants' disclaimer of intent to be disingenuous. It stated,

> "[f]urthermore, the Board cannot seriously contend that it did not apply its 'remedy' intentionally and for a political advantage in violation of the Fifteenth Amendment. These facts establish (1) actual intent to discriminate and (2) injury as a direct result of discrimination. *See*, *Garza* v. *County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 681 (1991). It is well established that intentional dilution for political reasons sustains a Fifteenth Amendment claim. (footnotes omitted)[14] *See*, *Armour* v. *Ohio*, 775 F. Supp. 1044, 1060-61."

Id. at 142-143a.

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[14] *Accord: Wright* v. *Rockefeller*, 376 U.S. 52, 66 (1964); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 346 (1960); *Ketchum* v. *Byrne*, 740 F.2d 1398,

The three elected Board officials here, Governor George Voinovich, Taft and Senator Stanley Aronoff, attempted to disavow any participation on their part in the drawing of the suspect districts by purporting to delegate their responsibility to Tilling.[15] Tilling is a professional politician who served as the chief of staff and Executive Director of the Republican Caucus, the director of the GOP caucus campaign committee, the chief fundraiser of the Ohio Republican Party, and the chief executive of the Republican-controlled Senate.[16] He acknowledged that he was fully familiar with the concept that by packing blacks the Republican Party could gain legislative seats.[17] Tilling and others discussed creation of majority-minority districts wherever possible as a winning strategy at meetings of the Republican National Committee. His files contained notes of such meetings in his own handwriting. He spoke at conferences of Republican officials on the Voting Rights Act on such issues as "building a file" to justify the Board's acts in the event of litigation. He conferred repeatedly with the chairman of the Ohio Republican Party, who urged that the Voting Rights Act be used as a device to obtain political advantage.[18] He also conferred repeatedly with Republican legislators concerning their preferences in the new districts.[19]

Tilling knew that black voters in Ohio voted 85-95% Democratic and that wherever blacks were 13% or more of

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1406-10 (7th Cir. 1984); *Buchanan v. City of Jackson*, 708 F.2d 1066, 1070-71 (6th Cir. 1983).

[15] Plaintiffs' Proposed Findings of Fact, Nos. 2-35 [hereinafter FOF] (Nos. 1-15, citing deposition of Stanley J. Aronoff, dated Nov. 27, 1991, pp. 10-11; Nos. 16-26, citing deposition of Robert A. Taft, dated Dec. 9, 1991, p. 8; Nos. 27-32, citing deposition of Governor George V. Voinovich, dated Dec. 16, 1991, p. 8; Nos. 33-35, citing deposition of James Tilling, Nov. 20, 1991, pp. 73-74, 96 [hereinafter Tilling I].

[16] FOF Nos. 364, 377 (citing Tilling II, pp. 36-37).

[17] FOF Nos. 86, 378 (citing Tilling II, pp. 63-65).

[18] FOF Nos. 381-383 (citing Tilling II, pp. 50-62).

[19] FOF Nos. 379, 384-386, 388-390 (citing Tilling II, pp. 10-11, 14-15, 19-21, 40-41).

the population, Democrats were inevitably elected.[20] He claimed that the apportioning process was not politically motivated, but he reduced the districts which had between 10-50% black population from 23 to 11, he increased the districts which had less than 8.5% black population by 9, he increased the districts with more than 50% black population by 5, he paired 20 of the 61 incumbent Democratic legislators with other Democrats, and he maneuvered the apportionment process so that there would be a shift of control in the House of Represenatives from Democrats to Republicans.[21]

Tilling discussed the matter of increasing majority-minority districts for the purpose of electing Republican legislators at panels of the reapportionment task force and panels sponsored by the National Republican Legislators Association and the Republican Legislative Leaders Association.[22]

In Tilling's files, produced in the course of discovery, Plaintiffs-Appellees uncovered a document entitled "Republican Opportunities," authored by David Horn, a friend and acquaintance of Mr. Tilling.[23] Horn delivered it to Joan Lawrence, a Republican legislator who in turn delivered it to Tilling.[24] "Republican Opportunities" is a strategic overview of the way in which Republicans might gain control of the Ohio General Assembly. It is explicit in its direction to "pack black minorities" in the major urban counties of Ohio.[25] It

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[20] FOF No. 378 (citing Tilling II, pp. 80-81).

[21] FOF Nos. 288-299, 391, 393 (citing deposition of Robert R. Dykes, dated Nov. 21, 1991, pp. 165-66, 171-72, 184, 192-93 [hereinafter Dykes I]; deposition of Robert R. Dykes, dated Dec. 12, 1991, pp. 9-21 [hereinafter Dykes II]; deposition of Robert Dykes, dated Dec. 13, 1991, p. 20; Tilling Depo., pp. 76-79, 206).

[22] FOF Nos. 86, 378 (citing Tilling II, pp. 63-65).

[23] FOF No. 359 (citing Tilling II, pp. 17-19).

[24] FOF Nos. 462, 465, 467, 469, 501, 510, 538, 545 (citing deposition of Joan Lawrence, Dec. 11, 1991, pp. 47-50, 53-54; deposition of David Horn, Dec. 10, 1991, pp. 11, 19, 82, 134).

[25] FOF Nos. 479, 502, 504-505, 511 (citing Lawrence, p. 109; Horn, pp. 12-13, 19).

recommended widespread pairing of Democratic incumbents and provided the names of likely candidates for such paring, who in fact were paired in the Board's plan struck by the court below.[26] Tilling read this document, maintained it in his files, and candidly admits that he would have presented it to the Apportionment Board majority but states that he did not do so because of "lack of time."[27]

Dr. Henderson, Plaintiffs-Appellees' expert, examined in detail the effects of the new boundaries in Hamilton County (Cincinnati), Franklin County (Columbus), Montgomery County (Dayton), and Lucas County (Toledo). He testified how in each precinct Tilling packed black voters beyond the numbers necessary to elect black representatives and deliberately fragmented those voters into Republican-dominated districts, where their vote would be diluted. Henderson considered the 1991 plan to be a roadmap to creating a racial gerrymander.[28]

The issue of where one starts in the process of drawing districts is critically important to the appropriate application of the Voting Rights Act. *See*, D.A. App. D at 121a-132a. When the Defendants-Appellants departed from a process approach to the application of the Voting Rights Act and instead looked to the effects they could achieve by *per se* application of majority-minority districting, they crossed over the line of intentional violation. The trial court emphasized this in its opinion:

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[26] FOF Nos. 517, 528, 533 (citing Horn, p. 38, 54, 60-61).

[27] FOF No. 359 (citing Tilling II, pp. 17-19). The author of Republican Opportunities also drafted a document entitled "Let's Pretend" which referred to Hamilton County, stating "[i]n this 'Republican' county the strategy is to 'pack' as much of the Democratic minority as possible into two heavily Democratic districts with black majorities." FOF No. 487 (citing Lawrence, p. 75. Mr. Horn's whole objective was to create what he called a Republican gerrymander. *Id.*; D.A. App. D at 143a n.9.

[28] FOF No. 426 (citing deposition of Gordon Henderson, Dec. 12, 1991, p. 57). The effect of this roadmap was to pair six Democratic legislators with 100% voting records in black influence districts, *i.e.* districts where black population was greater than 10%. FOF Nos. 322, 325, 337, 350 (citing Henderson, pp. 55, 64-65, 69, Ex. 17).

> "[T]he vital importance of following the proper process and avoiding the pitfalls of a *per se* application of majority-minority districting, the Board would arrogate to itself the unreviewable discretion to determine where and to what extent there existed dilution of minority voting strength. With such unchecked power to determine dilution an apportioning body acting cynically would be able to pack and fragment black voters at its political whim. Given the total absence of proof of legally significant racial bloc voting, the issue presented by the Board's argument is quite simple: whether an apportioning board should have unlimited discretion to apply the Voting Rights Act without a totalities analysis."

D.A. App. D at 139a-140a.

The Board could have followed the process of drawing a plan which complied with the anti-gerrymandering provisions of the Ohio Constitution. It could have then examined the districts which emerged from such a plan and made a preliminary inquiry as to whether racial bloc voting had historically been present and whether such bloc voting usually prevented blacks from electing a representative of their choice in these districts. Based on their preliminary analysis the Board could then have proceeded to determine whether potential Voting Rights Act violations were present. The time necessary to make these initial evaluations would have been minimal. Election results by district and legislative voting records of responsive and non-responsive legislators are readily available public records maintained by the Defendant-Appellant Taft and the Ohio Legislature.

Having conducted such a threshold examination, the Board could then have determined to what extent additional evidence was necessary to resolve any question of whether and to what extent the Voting Rights Act might be applicable.

Tilling, however, started with a different process. His first act was to examine the census of black population of each of the major urban areas in Ohio and to draw boundaries

around these black populations in the guise of following a "mandate."[29] This "mandate" was manufactured to avoid the obligation to make a particularized showing that a protected group had been denied the right to vote or that their right to vote had been canceled, minimized or diluted. Tilling achieved the politically desirable outcome by employing the "device" of assuming that mechanistically created *per se* black majority districts were required.

The trial court properly held that it was disingenuous for the Defendants-Appellants to argue that they did not know what they were doing, or that they had never conceived that the creation of majority-minority districts would destroy coalitional voting between blacks and whites, or that they were unaware that the packing and fragmenting would result in political advantage in light of the overwhelming factual record of this case. D.A. App. D at 133a-134a, 142a-143a.

IV. THE DEFENDANTS-APPELLANTS ARE IN EFFECT ARGUING FOR PROPORTIONAL REPRESENTATION, WHICH IS PROHIBITED UNDER SECTION 2(b) OF THE VOTING RIGHTS ACT

Assuming, *arguendo*, that the Defendants-Appellants' actions are, as they assert, entirely without political motivation, the rationale for their acts then appears to be that they are committed to a plan which seeks to guarantee proportional representation of black voters. Despite the absence of a record of legally significant racial bloc voting, the Board has insisted that there must be black populations in the reconfigured districts sufficient to "guarantee" the election of any black candidate, including non-incumbent black candidates. The Board justifies its boundaries on the grounds that it is creating "safe" black seats.[30]

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[29] FOF Nos. 92, 98 (citing Tilling I, pp. 61-62, 97).

[30] For example, Board Finding No. 183 states "[s]ince [minority] Representative Mallory is in his 60's, there is a particular need to reconfigure House District 23 to increase the relative percentage of black popula-

This Court has stated in *Gingles* that the issue in Voting Rights cases is not guaranteeing the election of black candidates. "Under Section 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate that is important." 478 U.S. at 68. A majority of the panel in *Armour* v. *Ohio*, 775 F. Supp. 1044, 1059 (N.D. Ohio 1991), stated, "the issue is not whether the plaintiffs can elect a black candidate, but rather whether they can elect a *candidate of their choice*."

The trial court dealt with the argument that the Board was attempting to guarantee safe seats, stating:

> "It is no defense to say that the concentration and dispersal of black voters is being done on a benevolent basis to guarantee the election of black candidates as the Board would argue. The Board's argument is nothing less than an argument for proportional representation. Section 2 of the Voting Rights Act makes it clear that, the totality of circumstances aside, nothing in that section 'establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.' "[31]

D.A. App. D at 142a.

Implicit in the "guarantee" of "safe" black seats is the premise that proportional repesentation is mandated. While

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tion in that district in order to provide an opportunity for a new black candidate without benefit of incumbency, to be elected in the district." D.A. App. H at 235a-236a. Similarly, Board Finding No. 187, *id.* at 236a, states that in increasing the black population in minority Representative Rankin's district, the rationale was that Rankin may not be a representative there through the year 2000; hence increasing black population in her district gives "an opportunity for the next generation of blacks who want to seek office in the Ohio legislature." Board Finding No. 186, *id.* at 238a. Both of these Findings ignore that one, equally logical, consequence of years of successful black-white coalitional voting of the type noted by the court below is a decreasing need to focus on the likelihood of future racial bloc voting.

[31] The court's Opinion noted that in Ohio, proportional representation would be a step backward for African-Americans. D.A. App. D at 142a.

in certain circumstances, *i.e.*, jurisdictions subject to Section 5 of the Voting Rights Act, or where Section 2 violations have been found, it may be entirely appropriate or necessary to configure districts which would more nearly assure the election of black candidates, this is not a mandate which has been applied generally to non-Section 5 states. The Defendants-Appellants' argument that mandatory proportional representation must be the goal flies in the face of the clear caveat of Section 2 of the Voting Rights Act "that nothing in this section can be construed to establish a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). While the Congress remains free to expand the scope of Section 5's reach, that is not a matter made discretionary in the federal court nor committed to the whims of state officials.

V. THE CASES CITED BY DEFENDANTS-APPELANTS DO NOT SUPPORT THEIR ARGUMENTS THAT MAJORITY-MINORITY DISTRICTS ARE MANDATED

In their Jurisdictional Statement, the Defendants-Appellants make the sweeping statement that, "the district court's decision of January 31, 1992 is contrary to every decision relating to the creation of minority-controlled districts." Jur. State., p. 2. Aside from the point that the Defendants-Appellants have stipulated that they are not appealing from the district court's decision of January 31, 1992, their case citations are inapposite.

The issue here is not whether the creation of minority districts is necessary to correct well-established and adjudicated past discriminatory practices, or to protect minorities "from being repeatedly outvoted," *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144, 168 (1977), or whether that can be done at the expense of white voters. Jur. State., pp. 10-12. These issues were settled long ago. Instead, the issue here is whether the Voting Rights Act requires an extreme political segregation of minority voters in the absence of either proven vote dilution violations of the Voting Rights

Act or a factual record that would meet the *Gingles* analysis. The cases cited by Defendants-Appellants do not even remotely address this issue and in any event none of the lower court rulings could purport to overrule or depart from this Court's decision in *Gingles* on this point.

The Defendants-Appellants apparently concede that the trial court correctly distinguished the *Carey* case and *Beer* v. *United States*, 425 U.S. 130 (1976), by noting that these were Section 5 cases while the present case is a Section 2 case. However, they criticize the conclusion of the trial court that the principles of Section 5 cases should not automatically be applied in a Section 2 case, stating, "the applicability of these [Section 5] principles to Section 2 cases, in and of itself, presents a substantial question which should be addressed by this court." Jur. State., p. 13 n.11. The Defendants-Appellants ask nothing less than that the Court abandon its ruling in *Gingles* requiring a totalities showing in Section 2 cases.

The trial court observed that with respect to states subject to Section 5 there has been a prior legislative determination that the discriminatory voting practices of that state have been so substantial that future redistricting plans are automatically suspect. In those states, the inability of minorities to participate equally in election processes has already been proven. D.A. App. D at 136a.

Ohio is not a Section 5 state. However, taking at face value the Defendants-Appellants' argument that Section 5 measures must be applied statewide, the trial court stated:

> "If officials of the state of Ohio seriously wish to concede that they have, in the past, intentionally and purposefully discriminated against minorities statewide, and that theirs is a state with a legacy of legally significant racial bloc voting, then this Court would be required to conclude that Congress had erred in excluding Ohio from the list of states subject to [Section 5 of] the Voting Rights Act."

D.A. App. D at 132a.

If the argument of the Defendants-Appellants is accepted by this Court, the holding of *Gingles* that at-large elections are not violative of the Voting Rights Act must be overruled because no logical distinction can be drawn between legislative elections and other elections. If mandatory majority-minority legislative districts in a community are valid, it follows that judicial, city, or county commission districts in the same community are equally valid. The first step following the adoption of such a mandatory rule will necessarily be the drawing of judicial, city and county commission districts wherever these races have been conducted on an at-large basis and a sufficient black majority exists to elect one or more such officials in the at-large district.

Gingles required a majority-minority district as a precondition to granting relief because, in the absence of such a district, no objective bright line measure for determining whether an injury had occurred would exist, since historically in North Carolina blacks had not been elected in the localities in issue. In Ohio, however, the ability and future potential to elect black representatives has been historically demonstrated. Accordingly, there is no need in Ohio to adopt a hypothetical majority-minority standard because other objective standards exist. Where blacks are able to elect representatives of choice by comfortable majorities, an objective measure for formulaing a remedy against any discriminatory structure (including majority-minority districts) is already in place. When the Board deliberately adds black voters to meet a non-historical, hypothetical standard in localities where blacks have been elected with far fewer black voters than the new standard requires, the Board then engages in discriminatory packing, albeit with an assertedly "benign" purpose.

The cases cited by Defendants-Appellants serve to confirm, rather than undermine, the correctness of the decision below. The Minnesota ruling,[32] which is tangentially relevant at best because it does not contain any finding of a violation under

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[32] *Cotlow* v. *Growe*, No. C8-91-985, slip op. at 12 (Minn. Redistricting Panel Nov. 21, 1991) (D.A. App. J).

the Voting Rights Act, states that concentration of minority voters is justified where it can "increase the probability that members of the minority will be elected." D.A. App. J at 291a. Since the facts as found by the court below show that minority legislators are already being elected in Ohio with substantial crossover votes from the majority white population, no such packing of minority voters has been justfied here. No similar evidence of successful minority elections with the aid of substantial white crossover votes was before the Minnesota court.[33]

The trial court aptly distinguished *Garza*, 918 F.2d 763, stating, "[t]here, the trial court found and the court of appeals confirmed that intentional discrimination had been practiced for decades against the Hispanic minority." *Garza*, 918 F.2d at 771. The court found that since at least 1959 and continuing in 1965, 1971 and 1981, Hispanic voters had been deliberately fragmented to dilute the effect of their vote on

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[33] Similarly, in *Wilson* v. *Eu*, 823 P.2d 545 (Cal. Jan. 27, 1992), the special masters relied heavily on the three-prong *Gingles* analysis in drawing the redistricting plan, and emphasized their concern to avoid not only the "unnecessary fragmentation" of minority voters, but also the "over-concentration of such groups in a single district," both of which were recognized to run afoul of the Voting Rights Act. *Id.* at 550. Although the factual background and political history of California and Ohio obviously differ, the same understanding of controlling federal law is evident in both decisions.

The same is true of the Texas ruling cited by Defendants-Appellants. It also applied the "totality of the circumstances" test set forth in the *Gingles* decision, noting that the lower courts have readily applied this same test in litigation over single-member districts. *See Terrazas* v. *Slagle*, Nos. 91-425, 426 & 428, slip op. at 9 (W.D. Tex. Dec. 24, 1991).

The citation to *Hastert* v. *State Board of Elections*, 777 F. Supp. 634, 650-51 (N.D. Ill. 1991), and the conclusion of the trial court there that "[r]acial and ethnic considerations are appropriate in drawing districts to advance the goals of the Voting Rights Act," was made in the context of the approval of a majority Hispanic district in light of the factual background that the Hispanic population had been judicially found to be the intentional victim of historic discrimination in the drawing of previous boundaries and because the community had been impermissibly fractured and its voting strength diluted. *Id.* at 650.

future elections and that despite this evidence, the apportioning body had refused to draw the necessary majority Hispanic district. *Id.* at 766, 769. Accordingly, the trial court properly concluded that: "[i]n *Garza*, not only was the totalities test satisfied, but the even stricter test of *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980) — intentional discrimination — had also been met. *See*, *Garza*, 198 F.2d at 771." D.A. App. D at 138a.

Accordingly, *Garza* does not stand for the proposition that a Board must draw majority-minority districts wherever possible, in the absence of conclusive proof of a Voting Rights Act violation. Rather, *Garza* indicates that such a district will be drawn by the court only where there is proof of intentional discrimination extending over many years.

In *Chisom* v. *Roemer*, ____ U.S. ____, 111 S. Ct. 2354 (1991) this Court held that Section 2 governs judicial elections and stated that Section 2 plaintiffs must demonstrate that an electoral device diminishes both their opportunity to participate in the political process *and* their opportunity to elect candidates of their choice. 111 S. Ct. at 2365. The Defendants-Appellants offered no evidence because none is available that black voters had been unable to elect representatives of choice in specific districts. *Chisom*, like *Gingles*, focused primarily on the impact of electoral practices on the ability of minorities to *elect* representatives of their own choosing.

VI. FOURTEENTH AMENDMENT VIOLATION

The trial court found that both the 1991 and 1992 plans of the Board violated the Fourteenth Amendment because the Board, on two occasions, ignored this Court's 10% total population deviation standard without justifying such deviations by compelling legitimate state interests. *White* v. *Regester*, 412 U.S. 755, 772-73 (1973) (Brennan, J., dissenting) (stating the general rule that emerges from the majority's holding). Article XI, Section 3 of the Ohio Constitution provides for a plus or minus 5% deviation from the ideal

legislative district population, thus providing a districting criterion that allows a deviation total of 10%.[34]

The Board created single-member districts that departed from the 10% total deviation standard in Fairfield, Wayne and Ashtabula Counties and in Senate District 32. D.A. App. D at 146a-147a. If there is a conflict between respect for political boundaries and adherence to the population standard, this conflict must give way to the equal population standard in the absence of compelling state reasons. The Board offered no justification whatsoever for its violation of the 10% standard and accordingly violated the Fourteenth Amendment. *See, e.g., Jeffers* v. *Clinton*, 730 F. Supp. 196, 207 (E.D. Ark. 1989), *aff'd mem.*, ____ U.S. ____, 111 S. Ct. 662 (1991); see also, *Connor* v. *Finch*, 431 U.S. 407, 416-17 (1977).

CONCLUSION

For each of these reasons, Defendants-Appellants' appeal should be dismissed and the ruling of the trial court should be affirmed.

DATED: May 11, 1992

Respectfully submitted,

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[34] *Supra*, fn. 2, p. 4.